183

(1)

Supreme Court, U.S.
FILED

101089 JAN 27 2011

OFFICE OF THE CLERK

No. _____

In The Supreme Court of The United States

JAMES M. KINDER,
Petitioner,

v.

ALLIED INTERSTATE, INC., *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

DAVID A. KAY
ATTORNEY AT LAW
750 B STREET, SUITE 2320
SAN DIEGO, CA 92101
TELEPHONE: (619) 501-2213
FACSIMILE: (619) 501-2214
davidkayappeals@cox.net

Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

1. May the States apply state substantive affirmative defenses, like assumption of the risk, to reduce or eliminate liability for violations of the federal Telephone Consumer Protection Act (TCPA), when prosecuted in state courts?

2. When a Federal statute requires cases to be filed in State courts to address violations of Federal law "if otherwise permitted by the laws or rules of court of a State...," may the State impose substantive limitations on these lawsuits that are inconsistent with Federal law, such as an exemption from the TCPA for calls made to pager numbers not currently connected to beepers?

PARTIES

James M. Kinder is an individual suing on his own behalf under the Telephone Consumer Protection Act.

Respondents are corporations alleged to have caused phone calls to be made to Kinder's pager number in violation of the Telephone Consumer Protection Act.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 7

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE STATES MAY APPLY STATE SUBSTANTIVE DEFENSES, SUCH AS ASSUMPTION OF THE RISK, TO EXCUSE VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT. 7

A. Introduction 7

B. The TCPA was intended to be applied in a substantively consistent manner, although Congress intended to allow the States to apply their own procedural law to TCPA claims 9

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER LANGUAGE IN A FEDERAL STATUTE AUTHORIZING ACTIONS TO BE BROUGHT IN STATE COURT "IF OTHERWISE PERMITTED BY THE LAWS OR RULES OF COURT OF A STATE" ALLOWS THE STATE TO IMPOSE SUBSTANTIVE LIMITATIONS ON THESE LAWSUITS THAT ARE INCONSISTENT WITH FEDERAL LAW, SUCH AS AN EXEMPTION FROM THE TCPA FOR CALLS MADE TO PAGER NUMBERS NOT CURRENTLY CONNECTED TO BEEPERS..... 19

A. Introduction 19

B. The Court of Appeal's requirement that a pager owner receive an audible beep on his or her pager device in order to recover under the TCPA illustrates the dangers of allowing the States to substantively change federal causes of action. 21

C. The Supreme Court will not likely receive another opportunity to review these important issues. 24

CONCLUSION 26

APPENDIX

DECISION OF COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO DATED AUGUST 2, 2010 ..... App. 1

DECISION OF COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO DATED AUGUST 30, 2010 DENYING REHEARING .....App. 25

DECISION OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW DATED OCTOBER 29, 2010.....App. 28

TABLE OF AUTHORITIES

Cases

Adler v. Vision Lab Telecommunications, Inc., 393 F. Supp.2d 35 (D.D.C 2005) 15

Bonime v. Avaya, 547 F.3d 497 (2d Cir. 2008) 13

Central V. R.R. v. White, 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915) 17

ESI Ergonomic Solutions, L.L.C v. United Artists Theatre Circuit, Inc., 203 Ariz. 94, 50 P.3d 844 (Ariz. Ct. App. 2002) 23

Holster v. Gatco, 130 S.Ct. 1575, 176 L.Ed.2d 716 (2010) 14

Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) 18

Kaufman v. ACS Systems, Inc., 110 Cal.App.4th 886, 2 Cal. Rptr.3d 296 (Cal. Ct. App. 2003) 4

Kruse v. McKenna, 178 P.3d 1198 (Colo. 2008) 13

Mfrs. Auto Leasing, Inc. v. Autoflex Leasing, Inc., 139 S.W. 3d 342 (Tex. App. Fort Worth. 2004) 18

Murphey v. Lanier, 204 F.3d 911 (9th Cir. 2000) 14

Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010) 14

State ex rel. Charvat v. Frye, 114 Ohio St.3d 76, 868 N.E.2d 270 (Ohio. 2007) 20

Sznyter v. Malone, 155 Cal.App.4th 1152, 66 Cal.Rptr. 3d 633 (Cal.App.4th Dist. 2007) 15

Williams v. Horvath, 16 Cal.3d 834, 548 P.2d 1125 (Ca. 1976) 16

Statutes

28 U.S.C. §1257(a) 1

39 U.S.C. §3017(e) 20

47 U.S.C. §227(b) ..... *passim*

Constitutional Provisions

U.S. Const. Art 6, cl.2 2

Other Authorities

Miller, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 Fed.Comm.L.J. 667 (2000) .. 10

Stano, *How Can They Keep Calling Me? Exemptions and Loopholes in the Telephone Consumer Protection Act and the Need for Further Regulation*, 50 Clev. St. L. Rev. 487 (2002) 10

OPINIONS BELOW

The unpublished opinion of the California Court of Appeals, Fourth Appellate District, Division II is set forth at Appendix 1. The Court of Appeal's unreported Order Modifying the Opinion and Denying Appellant's Petition for Rehearing is set forth at Appendix 25. The California Supreme Court's order denying discretionary review is unreported and is set forth at Appendix 28.

JURISDICTION

The California Court of Appeal's decision was issued on August 2, 2010. App. 1. The Court of Appeal's Order Modifying the Opinion and Denying Appellant's Petition for Rehearing was filed on August 30, 2010. App. 25. The California Supreme Court's order denying discretionary review was filed on October 29, 2010. App. 28. This Court has jurisdiction to review federal preemption issues decided by the California Court of Appeal under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This petition raises a federal preemption issue under the Supremacy Clause of the United States Constitution. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. Art 6, cl.2

The California Court of Appeal interpreted the Telephone Consumer Protection Act to allow California to apply its own substantive affirmative defenses, such as assumption of the risk, to suits brought under the Federal act.

The Telephone Consumer Protection Act (TCPA) provides:

> It shall be unlawful for any person within the United States ...to make any call...using any automatic telephone dialing system or an artificial or prerecorded voice...to any telephone

> number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call... (47 U.S.C. §227(b)(1)(A)(iii)).

The TCPA further provides:

> A person or entity may, if otherwise permitted by the laws or rules of a State, bring in an appropriate court of the State...an action to recover for actual monetary loss from such violation, or to receive $500.00 in damages for each such violation, whichever is greater...If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this section, the court may, in its discretion, increase the amount of the award to an amount equal to but not more than 3 times the amount available under subparagraph (B) of this paragraph... (47 U.S.C. §227(b)(3)(B)).

The TCPA provides only two federal affirmative defenses for calls that would otherwise violate the statute. "It shall be unlawful for any person within the United States...(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system

or an artificial or prerecorded voice..." (47 U.S.C. §227(b)(1)(A)). The defendants have never claimed that either one of these two federal affirmative defenses apply.

Although there is controversy on whether a State may opt out of the TCPA altogether, California has passed no statute which has done so. (*Kaufman v. ACS Systems, Inc.*, 110 Cal.App.4th 886, 898, 2 Cal. Rptr.3d 296, 306-307, (Cal. Ct. App. 2003).

STATEMENT OF THE CASE

Plaintiff James M. Kinder obtained the memorable pager number (619) 999-9999 in September of 1996. App. 4. Upon obtaining the pager number, he received 184 pages in the first 20 hours, none of them for him. App.4. He eventually received as many as 63,000 unwanted pages per month. App.4. Later, Kinder discovered that these pages were being generated by the "robocalling" industry, because it was standard practice in that industry to 999-999in data bases where the number for an individual was not known. App.4.

Kinder made efforts to alert the robocallers to this mistake. Kinder originally believed that he could solve the problem by calling the robocallers back and asking them to stop calling. (C.T., p. 824).[1]

---

[1] All citations to "C.T." refer to the Clerk's Transcript in the California Court of Appeal, "R.T." refers to the Reporter's Transcript in the California Court of Appeal, "A.O.B" refers to the Appellant's Opening Brief.

When he did succeed in getting a live person on the line, he inevitably received a mantra which would be repeated throughout his experience with this case: "Why don't you just change your number?" (C.T., p. 824).

After several months of this, Kinder came to a realization: "I realized one day in a moment of rare lucidity that I was having about as much force and effect at stopping people from calling this number as if I were standing on a seashore with a tsunami headed my way, holding up my hands to the wave and saying stop..." (C.T., p. 825).

So, he became frustrated and informed his paging service to stop sending activation signals to his beeper. Kinder continued to get unwanted messages on his voice mail, which crowded out any valid messages, but at least he would not hear the beeping. In all other respects, Kinder maintained his pager number and collected evidence of the calls on his voice mail by tape recording the messages. The number was still a "number assigned to a paging service." App. 5-6.

Kinder reasoned that stopping the activation signals was no different than putting the pager in a drawer with pillows on it to drown out the beeping, or removing the battery on the beeper, or simply turning the beeper off.

Over two years and four months after he obtained the pager number, Kinder discovered the existence of the Telephone Consumer Protection Act

from a telemarketer. (C.T., p. 848). Kinder hired an attorney and initiated the current action against defendant Allied Interstate. App. 6.

Approximately 165 similar but separate suits by the Plaintiff were consolidated, without objection, into one proceeding to determine whether Kinder had a "reasonable probability" of prevailing on any of his claims under California's vexatious litigant statute. App.12.

The trial court and California Court of Appeal found that Kinder had no reasonable probability of prevailing on his lawsuits for two reasons.

First, as to calls made to his pager number while the beeper activation signal was disconnected (solely due to the excessive illegal calls), the Court of Appeal implied an exemption from the TCPA for calls made to the pager number that did not actually beep the pager device. App. 13-17.

Second, as to calls made to his pager number after the beeper activation signal had been reconnected, the Court of Appeal found that Kinder "assumed the risk" of receiving those calls by maintaining his number after he knew that large numbers of illegal calls would be made to his number. App.18-24.

Both of these interpretations of the Telephone Consumer Protection Act were facilitated by the California Court of Appeal's conclusion that, "The TCPA itself directs that state substantive law should

govern its application when brought in federal court under diversity jurisdiction...Similarly, the TCPA commands that state substantive law be applied to TCPA actions filed in state courts..." App. 19.

After the denial of a Petition for Rehearing, the California Supreme Court denied review, using a highly unusual procedure. The Rules of the California Supreme Court require 4 of the 7 justices to vote for review. In this case 4 of the 7 justices recused themselves from voting on the Petition for Review. The Chief Justice appointed one additional justice to hear the petition. So, in order for review to be granted, all qualified justices, including the justice appointed only for this case, were required to vote for review. This did not happen. App. 28.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE STATES MAY APPLY STATE SUBSTANTIVE DEFENSES, SUCH AS ASSUMPTION OF THE RISK, TO EXCUSE VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT.

A. Introduction

Violations of the TCPA affect almost everyone who owns a residential telephone, a cell phone, or a pager number. Allowing the States to apply broad substantive defenses, such as assumption of the risk, to excuse violations of the Telephone Consumer Protection Act will impose an unpredictable and

unworkable hodgepodge of potentially conflicting rules on a national robocalling industry involving billions of dollars. Existing Federal and State case law does not adequately define or implement the statutory framework intended by Congress—mandating consistent federal substantive rules, applied in state courts using their own procedures.

For instance, the California substantive defense of "assumption of the risk," if applied to TCPA cases, would effectively excuse all violations of the TCPA where the recipient knew he might receive an illegal call. This same principle could be applied beyond pager owners to include residential and cell phone owners who have notice that illegal calls may be made to their numbers.

It is safe to say that few other states would allow such broad state substantive affirmative defenses. But, a full panoply of possible defenses would be introduced in a 50-state laboratory, incubating excuses for and exemptions from penalties for violating the TCPA.

The result would be a bonanza for attorneys representing the robocalling industry, since legal advice concerning centrally generated calls would have to be tailored to each state or jurisdiction, depending on the particular defenses or exemptions available in a particular state.

Even though the TCPA was enacted 20 years ago, existing Federal cases, including cases from the United States Supreme Court, have created doubt

about whether state substantive defenses should be applied to create defenses or exemptions from the TCPA in particular states.

The United States Supreme Court should grant the Petition for Writ of Certiorari to clearly establish the rules in accordance with the Congressional intent to maintain uniform substantive rules under federal law, even while the states are free to apply their own procedural rules to these suits mandated by the Telephone Consumer Protection Act.

B. The TCPA was intended to be applied in a substantively consistent manner, although Congress intended to allow the States to apply their own procedural law to TCPA claims.

Consumers do not enjoy receiving "robocalls," especially when they are expected to pay for the "privilege" of receiving them. "Robocalls" include pre-recorded messages delivered by automatic dialing machines and unwanted live messages where the call is placed by an automatic dialer that uses a "pacing algorithm" that senses how fast a boiler-room of 300 or more operators will be ready to move on to their next calls, and then dials the numbers for them. (C.T., p. 884).

In the year 2000, the robocalling industry raked in an astounding $612 billion by making 24 million calls per day, every day. (Stano, *How Can They Keep Calling Me? Exemptions and Loopholes*

in the Telephone Consumer Protection Act and the Need for Further Regulation, 50 Clev. St. L. Rev. 487, 488 (2002)).

In 1991, the problem was considerably less widespread, but was still intolerable. Senator Hollings was the main sponsor of the TCPA, and stated the problem: "They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall...It is telephone terrorism, and it has to stop..." (as quoted in Miller, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 Fed.Comm.L.J. 667, 668, (2000)).

Congress did not create a federal "telephone police" agency, but instead looked to private enforcement of the proposed statute in state court by placing a "bounty" of $500.00" on illegal calls under the TCPA.

Because enforcement of the TCPA was envisioned to be carried out by relatively unsophisticated litigants, before lower level judges in small claims court, the statute was drafted simply, with only two affirmative defenses and no element requiring a particular mental state.

The Telephone Consumer Protection Act was enacted in 1991 and provides:

> It shall be unlawful for any person within the United States ...to make any call...using any automatic telephone dialing system or an artificial or prerecorded voice...to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call... (47 U.S.C. §227(b)(1)(A)(iii)).

The TCPA further provides:

> A person or entity may, if otherwise permitted by the laws or rules of a State, bring in an appropriate court of the State...an action to recover for actual monetary loss from such violation, or to receive $500.00 in damages for each such violation, whichever is greater...If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this section, the court may, in its discretion, increase the amount of the award to an amount equal to but not more than 3 times the amount available under subparagraph (B) of this paragraph... (47 U.S.C. §227(b)(3)(B)).

The TCPA provides only two federal affirmative defenses for calls that would otherwise

violate the statute. "It shall be unlawful for any person within the United States...(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice..." (47 U.S.C. §227(b)(1)(A)). The defendants have never claimed that either one of these two federal affirmative defenses apply.

Because the offending calls come from and are directed to different States, it might seem obvious that the substantive requirements for a violation of the TCPA should be uniformly applied. Not so.

As pointed out by the California Court of Appeal, the only State Supreme Court case on the issue decided the opposite. App.19.

The Supreme Court of Colorado stated:

> ...McKenna argues that the issue of standing must be resolved by reference to federal law, to create a uniform interpretation of the federal statute at issue. We are not persuaded by this argument because the TCPA only allows a private right of action in state courts 'if otherwise permitted by the laws or rules of court of [the] state.' TCPA §227(b)(3). We construe this language as a statutory command to apply state substantive law in determining which persons or entities

> may bring TCPA claims in state court. (*Kruse v. McKenna*, 178 P.3d 1198, 1200, (Colo. 2008)).

Although the United States Supreme Court denied the Petition for Writ of Certiorari on this case in 2008, the issue has percolated further since that time. (*Kruse v. McKenna*, 129 S.Ct.. 112, 172 L.Ed.2d 35, (2008)).

The categorical statement about applying the substantive law of the States to the TCPA is echoed in other cases as well. *Kruse* cites *U.S. Fax Law Ctr., Inc. v. iHire, Inc.*, 476 F.3d 1112, 1118 (10th Cir. 2007.) for the proposition that "state substantive law" applies to determining which persons or entities may bring TCPA claims in federal court.

Other Federal circuit cases create similar confusion. The California Court of Appeal opinion in the case at bar cites *Bonime v. Avaya*, 547 F.3d 497, 501 (2d Cir. 2008) for the proposition that:

> Congress directed that the TCPA be applied as if it were state law...In other words, Congress drafted the TCPA so that it would interact with the federal and state judicial systems as would a state law. While the TCPA is not state law, Congress has clearly indicated that the courts should treat it as though it were. And so, for our purposes, it behaves as state law. Because the TCPA functionally operates as state

> law, we must apply the *Erie* doctrine to the TCPA, though the requirement to do so derives from Congressional instruction, and not from the Supreme Court's decision in *Erie*. App. 18-19.

The California Court of Appeal also concluded that *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000.) applied to establish that "Congress intended to create a federal statutory private cause of action enforceable in state courts by their choosing and did not intend that the TCPA apply uniformly, nationally." App.91.

The California Court of Appeal further declared that the "TCPA itself directs that state substantive law should govern its application when brought in federal court under diversity jurisdiction." App. 19.

In *Holster v. Gatco*, 130 S.Ct. 1575, 176 L.Ed.2d 716, (2010), Justice Scalia attempted to clear some of the confusion by noting that the *Bonime* transmutation of state procedural law into substantive law for the purposes of applying it in federal court under *Erie* has been abrogated by *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* , 130 S.Ct.. 1431, 176 L.Ed.2d 311, (2010). As explained by Justice Scalia, the second prong of *Bonime* should be interpreted so as to allow federal courts to use federal procedure once it is determined that the action itself could have been brought in state court. (*Holster v. Gatco, supra,* 130 S.Ct.. 1575, 1576).

Unfortunately, none of this clarification would seem to have had much effect on the lower courts. In the case at bar, the California Court of Appeal treated the reversal of *Bonime* as an unimportant development, and proceeded with its plan to apply state substantive law to TCPA claims. App. 26.

On the other hand, there is plenty of authority that TCPA claims should be treated as federal substantive causes of action, administered under state procedural rules.

A very similar issue was decided in *Sznyter v. Malone*, 155 Cal.App.4th 1152, 66 Cal.Rptr. 3d 633, (Cal.App.4th Dist. 2007). The defendant in *Sznyter* argued that the language "if otherwise permitted by the laws or rules of court of a State" meant that all state procedural rules applied, including the statute of limitations for similar state actions. (*Sznyter v. Malone, supra,* 155 Cal.App.4th 1152, 1157, 66 Cal.Rptr. 3d 633, 637).

The *Sznyter* Court found the opposite, quoting *Adler v. Vision Lab Telecommunications, Inc.*, 393 F. Supp.2d 35, 37 (D.D.C 2005) for the proposition that "The court said that the weight of authority held that the [quoted language] simply acknowledges the principle that states have the right to structure their own court systems and that state courts are not obligated to change their procedural rules to accommodate TCPA claims..." (*Sznyter v. Malone, supra,* 155 Cal.App.4th 1152, 1159, 66 Cal.Rptr. 3d 633, 637).

Sznyter also recites a formula often repeated in the cases concerning these distinctions:

> ...[W]hen a state court hears a case brought under a federal law, local laws control procedure, jurisdiction, administration, and venue. It is often said that 'federal law takes the state courts as it finds them,'...The particulars of a TCPA case (jurisdiction, venue, residency, amount in controversy, etc.) must fit the administrative and jurisdictional rules of the state court hearing the case. The Supremacy Clause does not reach these administrative and procedural issues...Congress cannot command which court in a state has jurisdiction over TCPA claims. Nor can it mandate the 'modes of procedure'... (*Sznyter v. Malone*, *supra,* 155 Cal.App.4th 1152, 1160, 66 Cal.Rptr. 3d 633, 638).

Since the statute of limitations had "substantive implications" *Sznyter* applied the federal statute of limitations. (*Sznyter v. Malone*, *supra,* 155 Cal.App.4th 1152, 1167-1168, 66 Cal.Rptr. 3d 633, 644).

California also adopted a similar approach in *Williams v. Horvath*, 16 Cal.3d 834, 841, 548 P.2d 1125, 1129-1130, (Ca. 1976). There the California Supreme Court concluded that a state claims statute

of limitations would not be applicable to a federal right of action under the anti-discrimination laws.

Ohio adopted a similar approach by finding that the state courts of Ohio could not impose additional requirements on the right to sue, not stated in the TCPA, such as placing the consumer's name on a "do not call list" prior to suing. (*State ex. rel. Charvat v. Frye* 114 Ohio St. 3d 76, 80, 868 N.E.2d 270, 274, (Ohio. 2007).

United States Supreme Court addressed the issue of whether a Rhode Island court could refuse to enforce the statutory penalties provided in the Emergency Price Control Act, which allowed the victim of overcharging to recover three times the amount of the overcharge, plus costs and reasonable attorney's fees, finding it could not. (*Testa v. Katt*, 330 U.S. 386, 393, 67 S.Ct. 810, 814, 91 L.Ed.967, 972, (1947).

Neither were states allowed to enforce state rules concerning contributory negligence and assumption of risk to limit a federally created right of action. (*Central V. R.R. v. White*, 238 U.S. 507, 511-512, 35 S.Ct. 865, 867, 59 L.Ed. 1433, 1436-1437, (1915)).

Likewise, the United States Supreme Court concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action..." (*Howlett v. Rose*, 496 U.S. 356,

378, 110 S.Ct. 2430, 2444, 110 L.Ed.2d 332, 354, (1990).

A Texas court has decided that "...as to the TCPA claims, this case involves a 'reverse-Erie' situation, in which the substantive law is federal and the procedural law is that of Texas..." (*Mfrs. Auto Leasing, Inc. v. Autoflex Leasing, Inc.*, 139 S.W. 3d 342, 346, (Tex. App. Fort Worth. 2004)).

So, there is substantial confusion in the lower courts over the application of state substantive law to cases under the TCPA. Although these issues have "percolated" since 1991, there is no definitive answer available to trial courts under the current state of the law.

The TCPA is an important federal statute protecting residential telephone consumers, cell phone owners, and pager owners, and should not be subject to differing substantive interpretations, based on what state is involved. Small claims litigants and judges are in no position to apply complicated substantive affirmative defenses and exemptions, developed piecemeal in each state. Neither is the current situation fair to the giant robocalling corporations, since they cannot determine what rules are applicable to their business without extensive legal advice on the substantive defenses available in each state.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER LANGUAGE IN A FEDERAL STATUTE AUTHORIZING ACTIONS TO BE BROUGHT IN STATE COURT "IF OTHERWISE PERMITTED BY THE LAWS OR RULES OF COURT OF A STATE" ALLOWS THE STATE TO IMPOSE SUBSTANTIVE LIMITATIONS ON THESE LAWSUITS THAT ARE INCONSISTENT WITH FEDERAL LAW, SUCH AS AN EXEMPTION FROM THE TCPA FOR CALLS MADE TO PAGER NUMBERS NOT CURRENTLY CONNECTED TO BEEPERS.

A. Introduction

Quite apart from the issue of whether States should be allowed to impose their own substantive affirmative defenses to cases brought in State court under the TCPA, the broader issue of the meaning of an enacting clause which imposes liability "if otherwise permitted by the laws or rules of the Court of a State" is an issue with application to all federal legislation that carries a similar qualification.

It may seem obvious that Congress intended the qualification to mean that federal substantive rules should be applied, but the States were free to use their own procedural rules. On closer examination, however, this point was not clear to the California Court of Appeal, and there are ambiguous cases that can reasonably be interpreted to allow States to modify the substantive requirements for a statutory violation.

example, all numbers in the (619) 999-**** block of numbers were assigned to a paging service, specifically Arch Wireless. (C.T., p. 984, 1027). Since the numbers assigned to a paging service are not subject to "porting" requirements, which would allow a customer to move his phone number to another carrier, all numbers in the (619) 999-**** block are still "assigned to a paging service." (C.T., p. 984).

This only makes sense, since the robocalling industry must have some way of determining whether a particular number is assigned to a paging service. The robocaller can eliminate calls to pager numbers using programming services that screen out numbers assigned to paging services. The robocaller has no information about what equipment is attached to the other end of the phone line, and has no knowledge as to whether a beeper is activated for a particular pager number. It is therefore the category of number that controls whether the call can legally be made using automatic dialing equipment, not what individual equipment is attached to a particular line.

Kinder also demonstrated that the robocalling industry had access to a $695.00 program (Telcordia) that enabled automatic dialing systems to download prohibited numbers and suppress illegal calls. (C.T., p. 395).

But, the California Court of Appeal interpreted the "number assigned to a pager service" language as requiring that the number be

connected such that the beeper would go off if the number were called. App. 13.

Existing case law demonstrates several possible potential excuses and exemptions which might be applicable in various states.

In California, there would only be a violation if the pager beeper was connected and was heard by the victim when a call was received.

An Ohio judge decided that it was not fair to penalize the robocallers unless the victim had placed his name on a "do not call" list prior to getting the phone call. (*State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 868 N.E.2d 270).

An Arizona judge thought that the penalties were too severe for the robocalling industry if too many calls were involved. (*ESI Ergonomic Solutions, L.L.C v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 50 P.3d 844, (Ariz. Ct. App. 2002).

In the case at bar, the California Court of Appeal initially thought that victims should have to prove that they were charged per call in order to recover under the TCPA. That portion of the Opinion was removed after the Court was supplied with FCC orders and rulings to the contrary.

Given a green light to modify the substantive requirements of a TCPA action, there is little doubt that 50 different versions of the statute would probably emerge. Keeping track of the defenses and

the United States Supreme Court to review these issues.

This case presents an ideal opportunity to address these important issues.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID A. KAY
ATTORNEY AT LAW
750 B Street, Suite 2320
San Diego, CA 92101
Telephone: (619) 501-2213
Facsimile: (619) 501-2214
Email: davidkayappeals@cox.net

Attorney for *Petitioner*

JAMES M. KINDER, Plaintiff and Appellant, v. ALLIED INTERSTATE, INC., Defendant and Respondent. [AND 74 OTHER CASES.]

E047086

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

2010 Cal. App. Unpub. LEXIS 6132

August 2, 2010, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: [*1]

APPEAL from the Superior Court of San Diego County. Super.Ct.No. GIC880543. Ronald L. Styn, Judge.

DISPOSITION: Affirmed.

COUNSEL: David A. Kay for Plaintiff and Appellant.

Lewis, Brisbois, Bisgaard & Smith, Jeffry A. Miller, Tim J. Vanden Heuval, Matthew B. Stucky; Manatt Phelps & Phillips, Becky S. Walker and Andrew H. Struve for Defendants and Respondents Allied Interstate, Inc. et al.

La Bella & McNamara, Thomas W. McNamara and Daniel M. Benjamin for Defendant and Respondent Time Warner Cable.

Murchison & Cumming, Kenneth H. Moreno and Scott J. Loeding for Defendant and Respondent Evergreen Professional Recovery, Inc.

Ellis, Coleman, Poirier, La Voie & Steinheimer, Mark E. Ellis and Andrew M. Steinheimer for Defendant and Respondent Bay Area Credit Services.

Debbie P. Kirkpatrick for Defendant and Respondent NCO Financial Systems, Inc.

JUDGES: MILLER, J.; RAMIREZ, P. J., KING, J. concurred.

OPINION BY: MILLER

OPINION

The trial court consolidated approximately 165 separate suits filed by plaintiff James M. Kinder (Kinder) alleging violations of the Telephone Con-

sumer Protection Act of 1997 (TCPA). (47 U.S.C. § 227 et seq.) [1]

The court segregated the cases into three groupings. Seventy-five defendants in the grouping known as "the non-telemarketing [*2] cases" (hereinafter "defendants") filed or joined in a motion seeking to have Kinder, a previously declared vexatious litigant, post a security bond pursuant to Code of Civil Procedure section 391.1. [2]

The court granted the motion and set Kinder's security bond in the amount of $ 1.5 million. Kinder failed to post the bond and the "non-telemarketing" cases were dismissed. [3]

On appeal, Kinder contends the court erred in determining that he was a vexatious litigant within the meaning of the statute, and in determining that

---

[1] The TCPA provides individuals with a private right of action for remuneration with respect to the receipt of certain statutorily specified, unsolicited telephonic communications. (*Boydston v. Asset Acceptance LLC* (N.D. Cal. 2007) 496 F.Supp.2d 1101.)

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[3] The other two case groupings were denoted the "Telemarketing cases" and the "Facsimile cases." The court later created a fourth grouping, the "residential phone cases." At least two individual defendants settled with plaintiff: one, a member of [*3] the "telemarketing cases," and the other, a member of the "fax cases." The court later ordered the "fax cases" to proceed individually. The remainder of the cases appear to have remained active in their respective groupings as of the time of the dismissal in the instant grouping of cases.

Interstate on February 6, 2007, alleging a single cause of action. [5]

Kinder contemporaneously filed a declaration pursuant to section 391.7 seeking permission to file the instant action as a vexatious litigant. The trial court granted his request. [*6] Defendants filed a motion to require Kinder to post security as a vexatious litigant. The court granted the request. Kinder failed to post the bond and the "non-telemarketing" cases were dismissed.

DISCUSSION

A. VEXATIOUS LITIGANT STATUS

1. SUFFICIENCY OF THE EVIDENCE THAT KINDER WAS A VEXATIOUS LITIGANT

Kinder contends on appeal, as he did below, that defendants adduced insufficient evidence that he was a vexatious litigant within the meaning of the statute. Defendants respond that Kinder's declaration for permission to file the current action as a vexatious litigant, his numerous previous requests for permission to file actions as a vexatious litigant, and his name's appearance on the list of vexatious litigants maintained by the Administrative Office of

---

[5] In the declaration attached to the complaint against Allied Interstate, Kinder averred that he had received 20 calls from Allied Interstate occurring between February 26, 2003, and February 6, 2006, all in violation of the TCPA. The complaints filed against the remaining consolidated defendants in the "non-telemarketing cases" are not a part of the record on appeal.

the Courts amounted to sufficient evidence for the court to conclude [*7] that Kinder was a vexatious litigant subject to posting a security bond. We agree with defendants.

Section 391.1 provides that:

> a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant.

A vexatious litigant is defined by statute as a person who does any of the following:

> (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained *in propria persona* at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. [P] (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, *in propria persona*, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the [*8] cause

Indeed, if Kinder's interpretation was correct, every time a defendant moves to compel a vexatious litigant to seek a prefiling order or post a security bond, it would be required to relitigate a determination that had already been made by another court. This would multiply the expense and efforts exerted by defendants in pursuing their statutory protections against litigious plaintiffs; a result in direct contravention of the purpose of the vexatious litigant statutes. Moreover, it would render the requirement that the Judicial Council maintain and disseminate a list of vexatious litigants meaningless, for the list would serve no purpose if not to notify courts that the individuals enumerated therein were subject to prefiling orders [*11] and the posting of security bonds.

Thus, substantial evidence supported the trial court's determination that Kinder was a vexatious litigant subject to posting a security bond.

2. APPLICABILITY OF VEXATIOUS LITIGANT STATUTES TO VEXATIOUS LITIGANTS REPRESENTED BY COUNSEL

Kinder contends that even if the court correctly determined that he was a vexatious litigant subject to the posting of a security bond, the statute was inapplicable to him because he was represented by counsel in the current action. Defendants respond that the vexatious litigant statutes are applicable to previously declared vexatious litigants regardless of

---

obtained a copy of that order from the Judicial Council and take judicial notice of it.

whether they are represented by attorneys [*12] in subsequent actions. We agree with defendants.

"The fact that plaintiff secured an attorney to lend his name to the subsequently filed complaint avails him naught. The provisions of the vexatious litigant statute . . . do not preclude a stay or dismissal because an attorney is used in the action in which the motion is made. [Citations.] Therefore, the use of an attorney . . . should not deprive the court of the power to protect itself from abuse of the judicial process." (*Muller v. Tanner* (1969) 2 Cal.App.3d 438, 444.) "A plain reading of the statute indicates the Legislature intended it to apply . . . to persons currently represented by counsel whose conduct was vexatious when they represented themselves in the past." (*Camerado Ins. Agency, Inc. v. Superior Court* (1993) 12 Cal.App.4th 838, 842 (*Camerado*).) "The legislative purpose would be frustrated by a construction of the statute which would permit a vexatious litigant to avoid the protection afforded potential targets simply by obtaining counsel." (*Ibid.*; see also *In re Shieh* (1993) 17 Cal.App.4th 1154, 1166, *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 49 and *Forrest v. State of California Dept. of Corporations* (2007) 150 Cal.App.4th 183, 195-196 [*13] for instances where the statutes have been applied to vexatious litigants represented by counsel.)

Kinder acknowledges *Camerado*, but contends that case was wrongly decided. We find no reason to contradict such a long-standing and well-settled area of the law. Indeed, *Camerado's* in-depth analysis of the issue including commentary subsequent to the

initial enactment of the statutes, and notation that the Legislature was presumably aware of the previous judicial construction of the statutes when it amended them in 1990, strongly supports its conclusion that the statutes were intended to apply to vexatious litigants represented by counsel. As *Camerado* ultimately determined, "A review of the 1990 amendments demonstrates the Legislature's intent to broaden the reach of the vexatious litigant statute." (*Camerado*, *supra*, 12 Cal.App.4th at p. 843.)

B. NO REASONABLE PROBABILITY OF PREVAILING

Kinder contends the court erred in determining that he had no reasonable probability of prevailing in the litigation. We disagree.

"Section 391.3 provides: 'If, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability **[*14]** that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix.' [Citation.]" (*Moran*, *supra*, 40 Cal.4th at p. 784, fns. omitted.) "Section 391.4 provides: 'When security that has been ordered furnished is not furnished as ordered, the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished.'" (*Id.* at p. 783, fn. 3.)

In ruling on the motion to provide security, the trial court may weigh the evidence presented on the motion; it is not required to assume the truth of the

plaintiff's alleged facts. (*Moran*, *supra*, 40 Cal.4th at p. 782.) "On appeal, of course, we presume the order is correct and we imply such findings as are necessary to support it. [Citations.]" (*Devereaux*, *supra*, 32 Cal.App.4th at p. 1582.) We review the trial court's order for substantial evidence. (*Ibid.*)

1. CALLS MADE WHILE THE PAGER WAS DISCONNECTED

It is unlawful for any person to make a call utilizing an automatic telephone dialing system "to any telephone number assigned to a paging service, cellular telephone [*15] service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." (47 U.S.C., § 227(b)(1)(A)(iii).)

We find substantial evidence supported the trial court's determination that Kinder had no reasonable probability of prevailing in his litigation with respect to those calls made while his pager was disconnected. Ample evidence supported defendants' contention that Kinder did not have a "telephone number assigned to a paging service" at any time period that was the subject of the instant litigation. In support of their motion to require Kinder to post a security bond, defendants submitted the declaration of Kimberly Edwards, the custodian of records for Arch Wireless/USA Mobility, the service provider for Kinder's pager service. In that declaration, Edwards averred that "the number (619) 999-9999 is not currently connected to a pager, and has not been connected to a pager at any time since the year 2002. It is a stand-alone voice mail." She further declared

marketers or other unwanted callers. (47 U.S.C., § 227; *Moser v. F.C.C.* (C.A.9 Or. 1995) 46 F.3d 970; [*18] Oklahoma ex rel. *Edmondson v. Pope* (W.D.Okla.2007) 505 F.Supp.2d 1098; *Minnesota ex rel. Hatch v. Sunbelt Communications and Marketing* (D.Minn.2002) 282 F.Supp.2d 976.)

Indeed, as the trial court noted, it was:

> persuaded the number must be assigned to one of the enumerated devices that is operated as assigned . . . . [A]ny other interpretation is clearly contrary to the purpose of the TCPA--to prevent wireless device users from receiving and paying for calls from unwanted solicitors." "The TCPA is not intended to apply to circumstances such as is presented in this case where the Plaintiff intentionally subjects himself to unwanted telephone calls and disconnects the number from his pager device, connects the number to a voice mail tape-recording system and employs a staff to listen to the voice mail messages and catalog the calls for the sole purpose of filing lawsuits." "The court finds [Kinder]'s conduct of intentionally subjecting himself to unwanted telephone calls, as a matter of policy, precludes [Kinder]'s recovery under the TCPA.

Thus, substantial evidence supported the court's order. [8]

---

[8] In their briefs, the parties addressed at length the applicability of the assumption of risk doctrine to the present case. Indeed, the trial court [*20] found, as an independent basis for

determining that plaintiff had no reasonable probability of prevailing in his litigation, that plaintiff had assumed the risk of the calls. However, it was unclear from the record or the briefs whether the parties contended that the court had ruled, properly or not, that the assumption of the risk doctrine applied to all the calls made to plaintiff's pager number in the instant case, or merely those made after reconnection of his pager. Indeed, the briefs of several parties insinuate the trial court applied the assumption of risk doctrine to all calls made to plaintiff's pager, even those preceding his disconnection of the service. At oral argument, however, it was made clear that the parties believed the assumption of risk doctrine was applied only to those calls made after plaintiff reconnected his pager in May 2007. As we noted above, we have neither all of the operative complaints nor a list of all the calls that were the subject of the consolidated cases. Thus, in our tentative opinion, we found Kinder's deactivation of his pager dispositive of the issue in its entirety, in our belief that all of the subject calls had been made prior to Kinder's [*21] reactivation of the pager. Indeed, in his deposition testimony, Kinder admitted that "the vast majority, if not all, of the calls [were] made prior to May, 2007" when he reconnected his pager service. (Italics added.) Therefore, we found no need to address the assumption of the risk doctrine in our tentative opinion. Nevertheless, we find plaintiff's disconnection of his pager dispositive as to all the calls made prior to its reconnection. Indeed, as the trial court noted: "the Court's ruling as to the disconnection of the number would be dispositive. I addressed the assumption of the risk argument just because it was there and these other arguments just because they were there. [?] . . . [T]he assumption of the risk portion [of the tentative ruling] is really not necessary to the ruling . . . [a]nd if I'm wrong on [the applicability of assumption of the risk], it wouldn't make any difference." Only at defense counsel's insistence that assumption of the risk was relevant to those calls made after reconnection of the pager did the trial court find it necessary to address that issue. Thus, we shall separately address the applicability of the assumption of the risk doctrine as to those [*22] calls made after Kinder reconnected the pager.

2. CALIFORNIA'S DOCTRINE OF ASSUMPTION OF THE RISK APPLIES TO ACTIONS FILED UNDER THE TCPA IN CALIFORNIA COURTS

The trial court held that the California doctrine of assumption of the risk was applicable to plaintiff's TCPA actions pursuant to 42 United State Code section 227(b)(3), which provides an individual may pursue a private right of action under the statute in state court "if otherwise permitted by the laws or rules of [the] court of [that] state . . . ." Plaintiff contends that the court erred in determining that California's equitable defense of assumption of risk applied because it is a substantive, rather than a procedural rule, which should not be applied to a federal cause of action. We disagree.

> Congress directed that the TCPA be applied as if it were a state law. [Citation.] In other words, Congress drafted the TCPA so that it would interact with the federal and state judicial systems as would a state law. While the TCPA is not state law, Congress has clearly indicated that the courts should treat it as though it were. And so, for our purposes, it behaves like state law.
>
> Because the TCPA functionally operates as state law, [*23] we must apply the Erie [9] doctrine to the TCPA, though the requirement to do so derives from Congressional instruction, and not from the Supreme Court's decision in Erie.

---

[9] *Erie Railroad Company v. Tompkins* (1938) 304 U.S. 64.

> (*Bonime v. Avaya, Inc.* (2d Cir. 2008) 547 F.3d 497, 501.)

Congress intended to create a federal statutory private cause of action enforceable in state courts by their choosing and did not intend that the TCPA apply uniformly, nationally. (*Murphey v. Lanier* (9th Cir. 2000) 204 F.3d 911, 915.) The TCPA itself directs that state substantive law should govern its application when brought in federal court under diversity jurisdiction. (See *Bonime*, at p. 501; *US Fax v. iHire* (10th Cir. 2007) 476 F.3d 1112, 1118; *Gottlieb v. Carnival Corporation* (2d Cir. 2006) 436 F.3d 335, 342; *Holster v. Gatco. Inc.* (E.D.N.Y. 2007) 485 F.Supp.2d 179, 183-185.)

Similarly, the TCPA commands that state substantive law be applied to TCPA actions filed in state courts. (See *Kruse v. McKenna* (Co. Sup. Ct. 2008) 178 P.3d 1198, 1200.) Thus, the trial court correctly applied the California affirmative defense of assumption of the risk to the instant case.

3. ASSUMPTION OF THE RISK AS TO THOSE [*24] CALLS MADE AFTER KINDER RECONNECTED HIS PAGER

In *Knight v. Jewett* (1992) 3 Cal.4th 296, the California Supreme Court summarized the assumption of the risk doctrine:

> In cases involving 'primary assumption of risk'--where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that

caused the injury--the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving 'secondary assumption of risk'--where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty--the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." (*Id.* at 314-315.) The court concluded that, in determining which doctrine applied, the pivotal question was whether, in light of the nature of the activity involved, defendant breached a legal duty of care to the plaintiff, or rather, had a legal duty to protect the plaintiff against a particular [*25] risk of harm in the first instance. [10] (*Id.* at pp. 315, 316-317.)

Whether the defendant owes a legal duty to protect the plaintiff from a particular risk of harm depends on the nature of the activity in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activi-

---

[10] While the Knight court stated the doctrine applied to activities or sports, it nowhere limited its applicability. "Instead, it established the defense's governing principles of risk for application on a case-by-case basis." (*Saville v. Sierra College* (2005) 133 Cal.App. 4th 857, 871.)

> ty. [Citation.] The existence and scope of the defendant's duty of care is a legal ques[illegible]on to be decided by the court rather than the jury. [Citation.] (*Curties v. Hill Top Developers, Inc.* (1993) 14 Cal.App.4th 1651, 1655.) In secondary assumption of risk cases, the defense is merged into the comparative fault scheme and the trier of fact may consider the relative responsibility of the parties. [Citation.] (*Ibid.*)

In the present case, for purposes of evaluating plaintiff's probability of prevailing in the litigation, there is no issue concerning duty. Defendants had a statutory duty not to call plaintiff's [*26] number and breached that duty by doing so. [11]

Thus, the case falls squarely within the category of secondary assumption of risk, meaning the comparative fault of the parties must be considered.

Here, we find substantial evidence supported the trial court's determination that plaintiff had no reasonable probability of prevailing because he assumed the risk of defendants' calls when he reconnected his pager; thus, he was primarily, if not exclusively at fault, for proceeding to encounter a known risk imposed by defendants' behavior. Soon after initiating service with his new beeper number in September 1996, Kinder learned that it was unusable due to the volume of calls received. Kinder eventually received

---

[11] We are, of course, left to ponder why some of the companies that apparently had approximately 10 years of notice that they were calling a number that exposed them to this type of lawsuit, continued to call that same number.

metaphorically placed his "cows" on the railroad tracks hoping they would be stricken. We would extend the analogy even further: Plaintiff's actions are consonant with an individual searching for unfenced land through which a railroad ran, purchasing the property at above-market prices, placing cows upon the rails without ever communicating his intention of doing so, or requesting that the railroad "fence in" the road, ceasing the placement of cows on the railroad when their procurement became oppressive, but continuing [*30] to sue for hypothetical cows he could have continued to place on the railroad, and then, again, placing cows on the railroad when he discovered that he could not recover for hypothetical cows.

DISPOSITION [13]

The judgment is affirmed. Respondents are awarded their costs on appeal.

/s/ MILLER

J.

We concur:

/s/ RAMIREZ

P. J.

/s/ KING

J.

---

[13] Defendant Allied Interstate, Inc.'s request for judicial notice filed on January 13, 2010, is denied. Likewise, Kinder's request for judicial notice received June 24, 2010, is denied.

JAMES M. KINDER, Plaintiff and Appellant, v. ALLIED INTERSTATE, INC., Defendant and Respondent. [AND 74 OTHER CASES.]

E047086

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

2010 Cal. App. Unpub. LEXIS 6911

August 30, 2010, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: [*1]
Super.Ct.No. GIC880543.

JUDGES: MILLER, J.; RAMIREZ, P. J., KING, J. concurred.

OPINION BY: MILLER

OPINION

ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

The petition for rehearing is denied. It is ordered that the opinion filed on August 2, 2010, be modified as follows:

1. The first sentence at the top of page No. 16, "(*Bonime v. Avaya, Inc.* (2d Cir. 2008) 547 F.3d 497, 501.)" is deleted and replaced with the following: "(*Bonime v. Avaya, Inc.* (2d Cir. 2008) 547 F.3d 497, 501, abrogated on other grounds as stated in *Holster v. Gatco, Inc.* (E.D.N.Y. 2007) 485 F.Supp.2d 179, 183-185.)"

2. The sentence on page 16, starting at the fifth line from the top: "(See *Bonime*, at p. 501; *US Fax v. iHire* (10th Cir. 2007) 476 F.3d 1112, 1118; *Gottlieb v. Carnival Corporation* (2d Cir. 2006) 436 F.3d 335, 342; *Holster v. Gatco, Inc.* (E.D.N.Y. 2007) 485 F.Supp.2d 179, 183-185.)," is deleted and replaced with the following:

"(See *Bonime*, at p. 501; *US Fax v. iHire* (10th Cir. 2007) 476 F.3d 1112, 1118; *Gottlieb v. Carnival Corporation* (2d Cir. 2006) 436 F.3d 335, 342.),"

Except for these modifications, the opinion remains unchanged. The modifications do not change the judgment.

/s/ MILLER

J.

We concur:

/s/ RAMIREZ

P. [*2] J.

/s/ KING

J.

KINDER (JAMES M.) v. ALLIED INTERSTATE, INC.

S186239

SUPREME COURT OF CALIFORNIA

2010 Cal. LEXIS 11294

October 29, 2010, Filed

PRIOR HISTORY: [*1]

Fourth Appellate District, Division Two, No. E047086.

Kinder (John M.) v. Allied Interstate, Incorporated, 2010 Cal. App. LEXIS 1638 (Cal. App. 4th Dist., Aug. 30, 2010)

JUDGES: Kennard, Baxter, Chin, and Corrigan, JJ., were recused and did not participate.

OPINION

Petition for review denied.

Kennard, Baxter, Chin, and Corrigan, JJ., were recused and did not participate. Associate Justice Mark B. Simons, Court of Appeal, First Appellate District, Division Five, was assigned by the Chief Justice pursuant to article VI, section 6 of the California constitution.